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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CAPITAL ONE, N.A., as Trustee of the BETA INDIVIDUAL EMPLOYER WELFARE BENEFIT PLAN AND TRUST, and POINTE BENEFIT CONSULTANTS, LLC as Administrator/Recordkeeper of the BETA INDIVIDUAL EMPLOYER WELFARE BENEFIT PLAN AND TRUST,

Plaintiffs,

vs.

LAWRENCE SAKS, M.D., JEANNE SAKS, and MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Defendants.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Counter-Claimant,

vs.

CAPITAL ONE, N.A., as Trustee of the BETA INDIVIDUAL EMPLOYER WELFARE BENEFIT PLAN AND TRUST,

Counter-Defendant.

Case No. CV13-06411 SJO (PSWx)

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY'S COUNTERCLAIM AGAINST CAPITAL ONE

[Filed Concurrently with Massachusetts Mutual Life Insurance Company's Answer to Plaintiffs' Complaint]

Complaint Filed: August 30, 2013

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Cross-Claimant,

vs.

LAWRENCE SAKS, M.D. and JEANNE SAKS,

Cross-Defendants.

Defendant, Counter-Claimant, and Cross-Claimant Massachusetts Mutual Life Insurance Company ("MassMutual") hereby files this Counterclaim against plaintiff and counter-defendant Capital One, N.A., as Trustee of the Beta Individual Employer Welfare Benefit Plan and Trust ("Capital One"), and allege as follows:

PARTIES

1. MassMutual was and now is, an insurance company existing under the laws of the Commonwealth of Massachusetts, with its principal place of business located in Springfield, Massachusetts.

2. MassMutual is duly qualified to engage in, and is engaging in, the business of insurance in the State of California.

3. MassMutual is informed and believes, and on that basis alleges that defendant and cross-defendant Lawrence Saks ("Saks") is, and at all relevant times was, an individual residing in Los Angeles County, California.

4. MassMutual is informed and believes, and on that basis alleges that Saks is, and at all relevant times was, a citizen of the State of California.

5. MassMutual is informed and believes, and on that basis alleges that plaintiff and counter-defendant Capital One is a national banking association with its main office located in Virginia. MassMutual is further informed and believes, and on that basis alleges that Capital One serves as the trustee of the Beta Individual Employer Welfare Benefit Plan and Trust (the "Plan").

6. MassMutual does not allege that Capital One, or any of its predecessors, engaged in any of the wrongful acts alleged herein relevant to this dispute, and names Capital One as a counter-defendant as the Policy owner and in its role as trustee of the Plan.

ALLEGATIONS

7. On or about December 3, 1998, Saks, a licensed plastic surgeon, completed a written application for a life insurance policy from MassMutual.

8. In said application, Saks stated that his occupation was a "General Partner" and that his occupational duties consisted of "Surgery."

9. Pursuant to the aforementioned application, and in reliance on statements made therein, on or about December 17, 1998, MassMutual issued a life insurance policy, Policy No. 11564044 ("Policy"), insuring the life of Saks.

10. A true and correct copy of the Policy is attached hereto as Exhibit "A" and incorporated herein.[1]

11. At the time of issuance, both the owner and beneficiary of the Policy were Capital One's predecessor, North Fork Bancorporation, Inc. ("NFB"), as trustee of the Beta Plan and Trust Dated August 24, 1994.

12. Pursuant to a request from NFB as owner of the Policy, and pursuant to the terms and conditions of the Policy, on or about August 18, 2004, the owner and beneficiary of the Policy were changed to NFB, as trustee of the Beta Individual Employer Welfare Benefit Plan and Trust Dated January 1, 2003.

13. MassMutual is informed and believes, and on that basis alleges that prior to the date this action was filed, Capital One became the trustee of the Beta Individual Employer Welfare Benefit Plan and Trust Dated January 1, 2003, and

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[1] Exhibit A does not include a copy of the Policy application in order to protect the privacy of the insured.

thereby became the owner and beneficiary of the Policy in its capacity as trustee.

14. The face amount of the Policy is $4,000,000.00.

15. The annual premium for the Policy is $201,530.00.

16. The Policy includes a Waiver of Premium Rider that provides, in part, as follows:

> After the Insured has been totally disabled for six months and all the conditions of this rider are met, we will waive premiums for this policy, including all riders this policy has.

17. The Waiver of Premium Rider defines "totally disabled" as follows:

> Total disability is an incapacity of the Insured that:
>
> - Is caused by sickness or injury; and
> - Begins while this rider and this policy are in full force; and
> - For the first 24 months of any period of total disability, prevents the Insured from performing substantially all the duties of the Insured's occupation; and
> - After total disability has continued for 24 months, prevents the Insured from engaging in any occupation the Insured is qualified to perform. For the first 24 months of any period of total disability, the Insured's occupation is the Insured's usual work, employment, business, or profession at the time total disability began. After total disability has continued for 24 months, any occupation the Insured is qualified to perform means any work, employment, business, or profession that the Insured is reasonably qualified to do based on education, training, or experience.

18. On or about October 18, 2003, Saks submitted a claim to MassMutual under the Policy's Waiver of Premium Rider, claiming that he was totally disabled from his occupation as a plastic surgeon and had been totally disabled since April 15, 2003.

19. Upon receiving Saks' claim that he was totally disabled, MassMutual accepted said claim and began to waive premiums for the Policy as of October 15, 2003.

20. MassMutual continued to waive premiums for the Policy until the claim was denied by letter dated June 15, 2007.

21. MassMutual alleges that Saks was not totally disabled as defined by the Policy and applicable law during all or some of the period from April 15, 2003 to June 15, 2007, and was able to and did perform the material duties of his occupation, including surgery, with reasonable continuity, during the relevant time period.

22. As a result of MassMutual's waiving premiums for the Policy, MassMutual has been damaged in an amount well in excess of $75,000, the exact amount to be proven at trial according to proof.

23. On March 21, 2008, Capital One, Lawrence Saks, and MassMutual entered into a tolling agreement under which they agreed to maintain the status quo between them as of that date, including maintaining their rights to assert and maintain any and all claims that could have been asserted or maintained as of March 21, 2008.

FIRST CLAIM FOR RELIEF

24. MassMutual realleges and incorporates by reference the allegations in paragraphs 1 through 23 above as though fully set forth herein.

25. An actual controversy exists between MassMutual on the one hand and Capital One on the other hand concerning their respective rights and duties under the Policy.

26. MassMutual contends that because of Saks' misrepresentations, omissions, concealment of material facts, and other acts, Saks was not entitled to a waiver of premiums under the terms and conditions of the Policy.

27. A declaration is necessary and appropriate at this time so that the parties may ascertain their respective rights and duties under the Policy and determine the value of the Policy.

PRAYER

WHEREFORE, MassMutual prays for judgment against Capital One as follows:

1. For an Order setting forth the parties' respective rights and duties under Policy No. 11564044;

2. For an Order declaring that Saks was not entitled to a waiver of premiums under the terms and conditions of Policy No. 11564044;

3. For an Order that MassMutual recover its costs and attorneys' fees; and

4. For such further relief as the Court may deem just and equitable.

Dated: October 31, 2013

MESERVE, MUMPER & HUGHES LLP
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By: *//s/Jason A. James*
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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY